IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 924 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
And
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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KAMLESHKUMAR MANRAKHAN - Appellant
Versus
STATE OF GUJARAT - Opponent

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Appearance :
MR BS SUPEHIA for Appellant :
Mr. H.M. PRACHCHHAK, LD. APP for Respondent:

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE S.R.BRAHMBHATT

Date : 12/04/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1.The appellant came to be convicted by learned Addl. Sessions Judge, Court No.3, Ahmadabad, for offences punishable under Section 302 and 498-A of Indian Penal Code while disposing of Sessions Case No. 289 of 1996 by judgment & order dated 21st July, 1997. The appellant was sentenced to undergo R.I. for life and to pay fine of Rs.500-00, and in default, to undergo R.I. for 2 months for the offence of murder. Whereas he was sentenced to undergo R.I. for one year and to pay fine of Rs.500=00, in default, to undergo R.I. for period of 2 months for the offence punishable under Section 498-A of I.P. Code.

2. The appellant was married to Sumitraben @ Sunitaben, daughter of Gorelal Hardayal Prajapati. It is the case of the prosecution that the appellant did not like deceased Sumitra resulting into his causing harassment to Sumitra. Sumitra made complaints about this to her father and other relatives. On 3/8/1996 deceased was taken to her matrimonial house after she had gone to her parental house following ill-treatment by the appellant. On 4/8/1996 in the mid-night of about 12.00 'O' clock it is alleged, while deceased was sleeping in

the home situated at Sardarnagar Approach Hutments, the appellant poured kerosene over the deceased and set her ablaze. The deceased sustained about 98 % burns of 1st and 3rd degree. She was taken to Civil Hospital. Her father was informed and he rushed to the hospital. On being asked, Sumitra told her father that while she was sleeping, the appellant poured kerosene over her and set her ablaze. She also told him that after she was set ablaze, when she tried to rush out of the house, the appellant pushed her; as a result she fell down. The deceased was given treatment in hospital and First Information Report was lodged by father of the deceased Gorelal. The Executive Magistrate was called to record dying declaration of the deceased which he did and recorded her dying declaration wherein also the deceased clearly implicated the appellant.

2.1 On basis of the First Information Report lodged by Gorelal Hardayal Prajapati; the father of the deceased, offence was registered and investigation started. The Investigating Officer at the end having found sufficient material implicating the appellant with the offences filed charge sheet against him in the Court of learned Metropolitan Magistrate, Ahmadabad. Since the

offences alleged against the appellant were triable exclusively by Court of Sessions, the case was committed to the City Sessions Court, Ahmadabad, and Sessions Case No. 289 of 1996 came to be registered. Case was transferred to City Sessions Court No. 12 and charge was framed at exhibit-1. The accused / appellant pleaded not guilty to the charge and claimed to be tried.

2.2 Considering the evidence led by the prosecution learned Judge of the City Sessions Court came to the conclusion that the prosecution was successful in establishing the charges against the appellant accused and recorded conviction and passed sentence stated in earlier part of this judgment.

2.3 Aggrieved by the said judgment & order of conviction the accused / appellant has preferred this appeal.

3. We have heard learned advocate Mr. Supehia and learned APP Mr. Prachchhak. They have taken us through the record & proceedings.

4. Learned advocate Mr. Supehia submitted that the prosecution case suffers from the defect of non disclosure of genesis of the incident and non disclosure of correct facts. Mr. Supehia submitted that neither the deceased nor any of the witnesses speak anything about the injuries sustained by the appellant in the incident while he tried to extinguish the fire to save deceased when she tried to commit suicide by setting herself ablaze. Mr. Supehia submitted that, the dying declaration recorded by the Executive Magistrate could not have been given any weightage. Commenting on other witnesses, Mr. Supehia, submitted that witnesses have deposed in a parrotlike manner. They all deposed that they asked the deceased as to how the incident occurred and deceased is claimed to have replied to them as to how the incident occurred. This aspect of oral dying declaration therefore becomes doubtful. Mr. Supehia therefore submitted that the appeal may be accepted, the judgment & order impugned herein may be quashed and st aside and the appellant may be acquitted of the charges levelled against him.

5. Learned APP Mr. Prachchhak has opposed this appeal. According to him the prosecution has proved the case

against the appellant to the hilt. The first informant is the father of the deceased. He speaks about cruelty being meted out to the deceased by the appellant. That cruelty was meted out even in recent past of the incident. It is only the previous day that the father left the deceased to her matrimonial home after soothing her and very next day the incident has occurred. Mr. Prachchhak submitted that the dying declaration made before Executive Magistrate is unassailable and on basis of that dying declaration alone; conviction can be founded and can be confirmed. Mr. Prachchhak submitted that the witnesses have deposed in a natural way. They are present when the deceased gave oral dying declaration to the father and it is possible that their expression about each of them asking the deceased and deceased replying to each of them individually may not be accurate but their presence stands established. Mr. Prachchhak submitted that there is no cross examination on this aspect. The deceased, a young lady of about 18 years of age, has been done to death, and involvement of the appellant is clearly proved by the prosecution. The appeal may therefore be dismissed.

6. We have taken into consideration rival side contentions in light of the evidence recorded by the trial court which is before us.

7. We find that the prosecution has examined following witnesses :-

Sr.No.	Name of Witnesses	Exhibit No.
1.	Gorelal Hardayal Prajapati- (first informant)	18
2.	Baijnath Sonelal prajapati	21
3.	Dr. Hasumatiben Ranchhodlal Patel	22
4.	Jageswardayal Buddhuprasad Prajapati	24
5.	Jagdish Sunderlal Parmar	25
6.	Bakuben Babulal	29
7.	Babubhai Manilal Waghri	30
8.	Chandrabhai Jiyaldas Gariyani	31
9.	Ramanbhai Maganbhai Patni	32
10.	Nathuram Gangaram Prajapati	33
11.	Jashram Mevaram Prajapati	34
12.	Dr. Vinodkumar Lajjaram Gupta	37
13.	Dr. Manish Arjunbhai Rathi	40
14.	PSI Magansinh Mansinh Thakor	43
15.	2nd P.I. Joravarsinh Manusinh Chavda	45.

7.1 We also find that the prosecution has placed reliance on following documentary evidences :-

Sr.No.	Document	Exhibit No.
1.	P.M. Report in respect of Sunita	7
2.	Yadi received from Civil Hospital	8
3.	Inquest Panchnama	9
4.	Complaint filed by complainant Gorelal	20
5.	Chiti received by Executive Magistrate for drawing Dying Declaration.	27
6.	OriginalDying declaration made by Sunita	28
7.	Copy of Vardhi	44
8.	Panchnama and map of place of incident	46
9.	Panchanama in respect of accused's body	47
10.	Certificate in respect of treatment given to accused.	48
11.	6 case papers in respect of treatment given to Sunita at Civil Hospital (total 12 on both the sides)	42

8.We have closely examined deposition of P.W-1, 2, 4, 10 and 11. P.W-1, father of the deceased is the first informant. All other witnesses are the persons who

had accompanied father of the deceased on learning about the incident. All of them have consistently deposed that the deceased had orally stated that the appellant had poured kerosene over her and set her ablaze. This consistent version remains unshaken during cross examination, as there is no cross examination on this aspect. Only an attempt is made during cross examination of P.W.1 to show that the deceased could not have given dying declaration by suggesting that oxygen was being given to the deceased when they went to the hospital, that she was unconscious and was not in a position to speak which have been firmly denied. Ofcourse P.W-1 says that the deceased was in a condition like unconscious. Barring this, there is nothing to doubt the version emerging from depositions of these witnesses regarding the oral dying declaration of the deceased.

8.1 However, an attempt was made to assail this deposition by saying that all of them have asserted that they have themselves questioned the deceased as to how the incident occurred and she had replied that she was set ablaze by her husband by pouring kerosene over her and therefore the story is unnatural and not

believable. In our opinion, these arguments sound good but there is no cross examination on this point. It has to be remembered that the witnesses have gone together to the deceased and deceased has given this declaration. The witnesses are mainly from Uttar Pradesh and are not so well educated and, therefore, they may not be accurate in their expression about all of them asking individually. They say that “I had asked the deceased and the deceased had replied that way“. This by itself is not sufficient to discard the evidence of these witnesses on the prosecution case.

9. Apart from oral dying declaration, there is a dying declaration recorded by Executive Magistrate which is at exhibit-28. Said dying declaration was recorded by P.W-5 Jagdish Sunderlal Parmar, Executive Magistrate. He has deposed that on receiving yadi he went to the hospital and inquired about the location of deceased through incharge sister and on being informed that she is in the dressing room, went to the dressing room. He put certain formal questions, then removed relatives and police from the room and then started recording the dying declaration in question answer form. He deposed that the deceased told him that her husband Kamlesh had poured kerosene over her and set

her ablaze. She also told him that the incident occurred at about 12.00 in the mid-night at her house when her husband set her ablaze. This witness has been cross examined at length and it emerges from cross examination itself that when he was recording dying declaration the attending doctor and nurse were present and, after recording the dying declaration he obtained endorsement of the doctor below the dying declaration. On examining the dying declaration exhibit-28 we find that there is a specific endorsement that doctor is present, relatives or police are not present, and then there is endorsement of the doctor which says that the patient is conscious.

9.1 The attending doctor Dr. Manish Arjunbhai Rathi has examined as P.W. 13 at exhibit-40. He says that when Executive Magistrate was recording dying declaration he was treating deceased Sunita. He says that he had put endorsement below dying declaration about the patient being conscious and then he has identified his signature. This doctor says that the Executive Magistrate had inquired of him about capacity of the deceased to give dying declaration. Doctor also says that the patient was not

administered any pain killer medicine till she died.

9.2 Thus it is clear from the evidence of the Executive Magistrate and the doctor that the Executive Magistrate firstly satisfied himself by putting formal question to the deceased about her consciousness and capacity to give dying declaration. He also appears to have inquired about the same from the doctor and then recorded the dying declaration and thereafter he obtained thumb impression of the deceased and obtained endorsement of the doctor about the patient being conscious. There is no reason to disbelieve the version of the doctor and the Executive Magistrate. They are public servants and have no axe to grind against the appellant. Their version is independent, unbiased, untarnished and reliable and, therefore, the dying declaration has to be accepted at its face value. Doctor also says that the injuries were sufficient to cause death in ordinary course of nature.

9.3 Dr. Jasumatiben Ranchhodbhai Patel who performed postmortem is examined as P.W-3 at exhibit-22. She also states that persons sustaining burns injury may not become unconscious till death irrespective of

extent of burns.

9.4 P.W-6, 8 and 9 Bakuben, Chandrabhai and Ramanbhai have not supported the prosecution case. However that does not affect or abrogate the effect of the other pieces of evidence which clearly implicate the appellant.

9.5 It is thus clearly established that the appellant caused burns injuries to the deceased which caused her death. The injuries were sufficeint in ordinary course of nature to cause death. They were caused while the deceased was sleeping. It also emerges that after the deceased was set ablaze, when she tried to escape, she was given a push by the appellant due to which she fell down. The sum total of this unimpeachable evidence is that the prosecution has successfully proved the charge of murder against appellant.

10. So far as the charge of offence punishable under section 498-A is concerned it is found from deposition of witness Gorelal Hardayal Prajapati as well as witness Baijnath Sonelal Prajapati and witness Jageswar Dayal Budduprasad Prajapati that

deceased used to complain of ill-treatment whenever the deceased went to her parental home and it was only the previous day that she was sent to her matrimonial home. The ill-treatment was; in terms; spelt out against the appellant and, there appears not any cross examination on this aspect. Therefore, that aspect also stands established.

11. An attempt was made to assail the judgment & order on the ground that the learned Judge has not appreciated that, there was a possibility of suicide. It was also canvassed that the deceased committed suicide by burning herself and the appellant himself sustained burns injuries in an attempt to extinguish the fire. It is also canvassed that the prosecution witnesses have deliberately suppressed the fact of the appellant having sustained injuries while attempting to extinguish fire.

11.1 We have examined these aspects with the help of record & proceedings. We find no substance in any of these contentions for the reason that in the statement under Section 313 of Criminal Procedure Code no specific plea about the deceased having committed suicide and the appellant having

sustained burns injuries in an attempt to extinguish fire is taken. The deceased had sustained 98 % burns and it can not be expected of her to give detailed version about the incident in such a situation when death was staring at her. In dying declaration she is supposed to reveal the cause of her death or circumstances responsible for her death and that she has done properly. The other witnesses are not eye witnesses. They only speak of oral dying declaration and previous cruelty. Therefore, there is no question of these witnesses saying anything about suicide or the appellant sustaining burns injuries while attempting to rescue the deceased.

11.2 The conduct of the accused is also worth a note. Deposition of Dr. Vinodkumar Lajjaram Gupta, P.W-12, exhibit-37 indicates that he had treated the appellant. The appellant had given history to the doctor. In that history he indicated to the doctor that while he was sleeping with his wife in the room a spark fell from the ceiling fan resulting into burns injuries sustained by both of them. The appellant had sustained burns injuries on face, neck and both the hands. Thus the appellant

has taken self-contradictory and inconsistent stand before the court and before the doctor. Except throwing a suggestion to the witness during cross which have been emphatically denied by the witness, there is no material to infer that deceased had committed suicide. It is, therefore, not possible to accept the contention that the prosecution has suppressed the genesis, that the appellant sustained injuries in an attempt to rescue the deceased and that the trial court overlooked this aspect and erred in recording conviction. On the contrary, as stated above, except making suggestion there is nothing to infer that the deceased had committed suicide. It can not be said that the genesis of incident is suppressed. It also can not be said that the fact that appellant had sustained burns injuries is suppressed. It is also not the case that the injuries on person of appellant are not explained, though fact is that specific explanation is not coming forward. But prosecution evidence does reveal that while deceased was trying to escape in burning condition the appellant gave her a push and she fell down. Under the circumstances, we are of the view that the contradiction is of no consequence so far as merits

of the prosecution case are concerned. The contradictions are nothing but only an after thought defence.

12. We have examined the judgment of the trial court as well. In our opinion, conviction is rightly recorded. There is no substance in any of the contentions raised before us. There is overwhelming evidence in form of dying declaration and oral dying declarations before witnesses who are found to be reliable by us, and therefore, we do not find any reason to interfere with the judgment & order recording conviction. We do not find any reason for interfering with the quantum of sentence either. The appeal, therefore, must fail. Appeal stands dismissed. Judgment & order impugned is hereby confirmed.

[A.L. DAVE, J]

[S.R. BRAHMBHATT, J]

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